In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1395

FREDERICK B. KROL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1967. A petition for rehearing *en banc* was denied on April 17, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a non-jury trial, petitioner was prejudiced by the admission of certain testimony, where the trial judge specifically stated that he would not consider such testimony as a factor tending to show guilt or innocence.

2. Whether tape recordings of conversations, made with the consent of one of the participants, were properly admitted into evidence.

3. Whether the trial court's decision was inconsistent.

STATUTES INVOLVED

Article 14 of the Illinois Criminal Code of 1961, Ill. Stat. Ann., Ch. 38, Art. 14, provides in pertinent part:

> Section 14-1:
>
> (a) Eavesdropping device
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means * * *.
>
> * * * *
>
> Section 14-2:
>
> A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or

record all or any part of any oral conversation without the consent of any party thereto * * *.

* * * *

Section 14-5:

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial * * *.

STATEMENT

After a non-jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of aiding and abetting one Carl Madda to corruptly give $200 to an Assistant United States Attorney with intent to influence his official action in a pending civil matter, in violation of 18 U.S.C. 201(b).[1] On May 26, 1966, he was sentenced to imprisonment for eighteen months. The court of appeals affirmed the conviction (Pet. App. 1-8).

The government's evidence consisted primarily of the testimony of Erwin I. Katz, the Assistant United States Attorney in charge of the case of *Johnnie Janus* v. *United States*, a tort claims case alleging injuries sustained in a collision with a Post Office vehicle. The attorneys of record representing Janus were petitioner and one Carl Madda (A. 6).[2] In discussions relating to possible settlement of the case, Katz called Madda at petitioner's office and told

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[1] Petitioner was acquitted of conspiring to commit the substantive offense.

[2] "A." refers to appellant's appendix in the court below, which is on file with the Clerk of this Court.

Madda that he could not offer, on behalf of the government, more than $500. At Madda's request, Katz consented to a meeting at petitioner's office (A. 7). During the meeting, while petitioner was on the telephone with another client, Madda offered Katz $200 for himself if the latter would agree to a settlement of $2000. Katz refused to change the terms of the proposed settlement. Madda, again while petitioner was on the telephone, repeated his offer (A. 8-9).[3] Katz advised that he would telephone the following day. When petitioner concluded his telephone conversation, he suggested that the case should be settled promptly. Katz said, "Well, I'll call back tomorrow on the basis of what Carl (Madda) just said" (A. 10).

Katz immediately reported the terms of the Madda offer to his superior, who, in turn, notified officials of the Federal Bureau of Investigation. The following afternoon, with Katz' consent, agents attached a tape recorder to his telephone by means of a suction device attached to the earpiece. Katz then called petitioner's office and told petitioner that he was calling in response to the conversation which he had had with Madda the previous day (A. 10-11). Petitioner told Katz that Madda was not there, but that he could handle it himself, since the *Janus* case was actually his case. Katz replied that he would prefer to speak with Madda, and petitioner said that he would have Madda return the call later in the day (A. 11).

[3] Katz was unsure whether or not petitioner overheard Madda's solicitations.

Subsequently, Madda arranged to meet Katz in a nearby cocktail lounge (A. 12-13). Katz, who was equipped with a tape recorder, asked Madda if he was serious about the offer. Madda said, "Well, look, Erv, you scare me. You are talking like you have a tape recorder." After Katz apparently allayed his fears, Madda passed him a note on a napkin which said, "Okay on the deal" (A. 14-15).

At court the following day, Katz advised the judge that the case had been settled. At a nearby restaurant Madda passed Katz $200, and was arrested by surveilling agents (A. 18).

In addition to the above testimony, the government introduced a transcript of petitioner's testimony at Madda's trial.[4] Petitioner there admitted that he gave the $200 to Madda and that he was aware that the money was to go to Katz, but said that Katz had first broached the offer (A. 37-40).

ARGUMENT

1. Over objection, F.B.I. Agent Bloom testified that, on two occasions after Madda's arrest, petitioner had refused to discuss the circumstances precipitating that arrest, and that, on one occasion, petitioner had said that he did not want to make a statement until he had consulted with counsel (A. 36-37).[5] As noted by the court below, the trial judge

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[4] In a separate trial, Madda was convicted of a violation of Section 201(b) based upon this incident. See *United States* v. *Madda*, 345 F.2d 400 (C.A. 7).

[5] It appears that the government offered this testimony in anticipation of petitioner's suspected defense (derived from

overruled petitioner's objection—based on the ground that the government was improperly attempting to create an adverse inference of guilt by showing his refusal to make a statement—expressly stating (Pet. App. 7):

> "All of this may stand solely for the purpose of showing that [the witness] had conversation of sufficient amount to know [defendant's] voice, according to his conversation, because a man has no obligation, as the law is clear, to testify, and refusing to discuss a matter is neither acknowledgement of guilt nor can be held against a person, so that is clear, but for the purpose of showing whether or not he knew his voice when he heard him, this is proper."

It is thus plain that the trial judge limited his consideration of this testimony to the purpose for which it was admitted—*i.e.*, to establish the evidentiary foundation that Agent Bloom recognized petitioner's voice on the telephone—and that he did not consider it as a factor tending to prove guilt or innocence. See *United States* v. *Oliver*, 363 F.2d 15 (C.A. 7); *United States* v. *Brooks*, 355 F.2d 540, 542 (C.A. 7). As stated in the latter case (355 F.2d at 542): "Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers

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his testimony in the Madda trial) that Katz initiated the illicit solicitation for a bribe. By showing that petitioner, himself an attorney and member of the bar, did not immediately report the alleged transgression (although opportunity was available), the government attempted to rebut the alleged defense.

of evidence excluded by rulings after hearing arguments on admissibility of that evidence." The evidence against petitioner was overwhelming, and he was not prejudiced by the testimony, the use of which was carefully limited by the trier of fact. Thus, the court below properly concluded that the admission of this testimony did not constitute "prejudicial error which requires a reversal," regarding it, "[i]n the context in which it occurred," as being "harmless" (Pet. App. 7).

2. In corroboration of the testimony of Katz, the court admitted, over petitioner's objection, the tape recordings of his conversations with petitioner and Madda, recorded with Katz' consent (A. 20-22, 23, 26-30, 41).[6] Petitioner contends that the conversations were recorded in violation of the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code), and were therefore inadmissible in the federal criminal proceeding.[7] As pointed out in the government's briefs in opposition in *Watkins* v. *United States*, No. 976, this Term, and *Martin and Parker* v. *United States*, No. 1235, this Term, in which cases certiorari was denied on February 27, 1967 and May 22, 1967, respectively, that statute proscribes only the use of an eavesdropping device to hear or record a conversation "without the consent of any

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[6] Petitioner did not object to Katz' testifying to the substance of the conversations.

[7] Petitioner properly does not argue that the conversations were recorded in violation of Section 605 of the Federal Communications Act. *Rathbun* v. *United States*, 355 U.S. 107, 109-111.

party thereto." Ill. Stat. Ann., Ch. 38, § 14-2. In *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154, upon which petitioner relies, the Illinois Supreme Court did not hold that recording a conversation in the circumstances involved here constitutes a violation of the eavesdropping statute; it rejected this construction and held merely that, as a rule of evidence, the recordings so obtained were intended by the legislature to be admissible only against the consenting party in State court proceedings (216 N.E.2d at 158). Accordingly, there is no reason to consider the appropriateness of sanctions under this Court's supervisory power; the recordings so obtained were properly admitted in the federal criminal proceeding. See *Lopez* v. *United States*, 373 U.S. 427, 440; see also *Osborn* v. *United States*, 385 U.S. 323, 327-331).

3. The trial court's decision was not inconsistent in finding petitioner guilty of aiding and abetting Madda but not guilty on the conspiracy count. Aiding and abetting the commission of a substantive offense is a crime different from a conspiracy to commit the same substantive offense, *Bollenbach* v. *United States*, 326 U.S. 607, 611—the gist of the latter being an agreement to commit the substantive offense. On the facts of this case, where it was shown that petitioner gave Madda the $200 which he knew was to be given to Katz, the court properly concluded that petitioner aided and abetted the commission of a crime without necessarily reaching the conclusion that there was an agreement between petitioner and Madda to commit the offense, or that such an agreement had been

proved beyond a reasonable doubt (see Pet. App. 5-6). There was thus no factual inconsistency in the trial court's decision.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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JUNE 1967

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[8] In rendering his decision, the trial judge stated (A. 42):

> The court is of the opinion that the defendant is guilty on Count 1, and so finds. As to Count 2, the court is of the opinion that the evidence does not warrant the court concluding beyond a reasonable doubt that he is guilty of a conspiracy. The court is of the opinion that he knew about it and aided, but when I review the testimony of Mr. Katz in the matter I cannot come to the conclusion that there was a conspiracy.

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